WAN MOHD NAZRI WAN HASSAN A

v.

ADVOCATES & SOLICITORS DISCIPLINARY BOARD

HIGH COURT MALAYA, KUALA LUMPUR B
RAUS SHARIF J
[ORIGINATING SUMMONS NO: R1-17-106-2005]
29 NOVEMBER 2005

LEGAL PROFESSION: *Professional discipline - Disciplinary proceedings - Whether Disciplinary Board must obtain Investigating Tribunal's report before determining whether to commence formal investigation by a Disciplinary Committee - Whether Disciplinary Board may bypass Investigating Tribunal and appoint a Disciplinary Committee* C

LEGAL PROFESSION: *Professional discipline - Disciplinary Board - Discretion and powers vested with Disciplinary Board in conducting disciplinary proceedings* D

A company had lodged a complaint against the plaintiff (an advocate & solicitor) to the defendant. The defendant then sent E
a notice to the plaintiff, requesting the plaintiff's written explanation to the complaint within 14 days from the date of receipt of the said notice. Since the defendant did not receive any explanation from the plaintiff, the defendant proceeded to consider the complaint at its meeting and decided to refer it to a F
Disciplinary Committee pursuant to s. 103A(a) of the Legal Professional Act 1976 ('LPA'). The plaintiff was informed of this by the defendant by way of letter. The plaintiff through his solicitors then wrote to the Chairman of the Disciplinary Committee seeking clarification as to why a Disciplinary G
Committee had been constituted to hear the complaint when no prior investigation had been conducted by any Investigating Tribunal pursuant to the LPA. The Chairman of the Disciplinary Committee responded to the plaintiff's solicitors in a letter informing that the preliminary objection can only be heard at the H
hearing presided by the Disciplinary Committee itself. The Disciplinary Committee then proceeded with hearing the complaint and fixed 16 September 2005 to continue the hearing of the complaint.

I

A Meanwhile, on 13 September 2005, the plaintiff filed this action seeking the following declarations and relief against the defendant: (i) a declaration that the defendant had wrongly appointed a Disciplinary Committee to hear a complaint against the plaintiff without first appointing and obtaining a report from an B Investigating Tribunal; (ii) a declaration that the disciplinary proceedings carried out by the Disciplinary Committee purportedly appointed by the defendant were in breach of the provisions of the LPA; (iii) a declaration that the disciplinary proceedings taken thus far against the plaintiff by the Disciplinary Committee C appointed by the defendant were null and void; and (iv) an injunction to stop all further disciplinary proceedings against the plaintiff by the Disciplinary Committee appointed by the defendant. The hearing before the Disciplinary Committee was further adjourned in view of these proceedings.

D

Learned counsel for the plaintiff submitted that there was only one issue to be tried in this matter namely: "Whether the defendant can proceed with a complaint made against the plaintiff, by appointing a Disciplinary Committee without first appointing an E Investigating Tribunal to inquire into the complaint and submit a report, pursuant to the provisions of the LPA." It was not disputed that the defendant had not at any time constituted an Investigating Tribunal to inquire into the complaint and submit a report to the defendant for its consideration. Thus, it was the F contention of the plaintiff that the defendant in bypassing the Investigating Tribunal and appointing a Disciplinary Committee had resulted in the defendant breaching the LPA and consequently rendered the proceedings commenced against the plaintiff to be void for procedural unfairness. Learned counsel for the defendant G submitted that the Disciplinary Board has the power to constitute a Disciplinary Committee without first constituting an Investigating Tribunal. It is also contended by the defendant that the plaintiff had not exhausted the domestic remedy open to him. According to the defendant, there was still a forum available to the plaintiff H to air his grievances or put forth his objection before the Disciplinary Committee.

Held (allowing the plaintiff's application):

(1) The only discretion vested with the Disciplinary Board at this I stage is to decide whether there is merit or not in the complaint. If it considers that there is merit in the complaint, then it shall forthwith constitute an Investigating Tribunal.

Only when the Disciplinary Board has received a report from an Investigating Tribunal and the Disciplinary Board determines that there ought to be a formal investigation, that a Disciplinary Committee is appointed to investigate the complaint. The prerequisite is that there must be a report from the Investigating Tribunal first and a decision by the Disciplinary Board that a formal investigation is required. By the defendant bypassing the Investigating Tribunal and appointing a Disciplinary Committee, the defendant had unilaterally removed one of the tiers provided for by Parliament in the LPA for investigating a complaint. The defendant cannot unilaterally do this and ignore the clear and express provisions of the LPA. (paras 19, 21 & 22)

(2) Looking at the scheme of the Act, the only time when the Disciplinary Board may constitute a Disciplinary Committee without constituting an Investigating Tribunal is when an advocate and solicitor has been convicted of an offence of criminal breach of trust or any other offence involving fraud or dishonesty, or the advocate and solicitor has been suspended under s. 94(4) of the LPA. In the presence case, the plaintiff had not been convicted of any criminal case nor had he been suspended. Hence, it was incumbent upon the defendant to follow the procedures as laid down by the LPA and not to unilaterally circumvent the statutory procedure provided for in the LPA. (para 25)

(3) The question of exhausting the domestic remedy provided under the LPA did not arise because the very domestic remedy and procedure provided for under the LPA had been clearly ignored and breached by the defendant. The defendant cannot shield its unlawful conduct in bypassing and breaching the LPA and then claim that the plaintiff has not exhausted the domestic remedy for under the LPA. One cannot exhaust a remedy when one part of that very remedy has been unilaterally removed by the defendant. (para 26)

(4) The very root of the provisions of LPA relating to the scheme of disciplinary proceedings as provided under the LPA had been breached. (para 27)

Legislation referred to:
Legal Profession Act 1976, ss. 93, 94(4), 95, 96, 97, 99, 100, 101, 102, 103A(a), 103B

For the plaintiff - Alex De Silva; M/s De Silva
For the defendant - Maidzuara Mohamed; M/s Logan Sabapathy & Co

Reported by Amutha Suppayah

JUDGMENT

Raus Sharif J:

[1] In this originating summons filed on 13 September 2005, the plaintiff, an advocate and solicitor, seeks several declarations and relief against the defendant, *inter alia*:

(i) A declaration that the defendant has wrongly appointed a Disciplinary Committee to hear a complaint against the plaintiff without first appointing and obtaining a report from an Investigating Tribunal;

(ii) A declaration that the disciplinary proceedings carried out by the Disciplinary Committee purportedly appointed by the defendant is in breach of the provisions of the Legal Profession Act 1976;

(iii) A declaration that the disciplinary proceedings taken thus far against the plaintiff by the Disciplinary Committee appointed by the defendant is null and void; and

(iv) An injunction to stop all further disciplinary proceedings against the plaintiff by the Disciplinary Committee appointed by the defendant.

[2] On the same date, the plaintiff had also filed an application for interlocutory injunctions by way of summons in chambers.

[3] On 28 September, with consent of both parties, this court ordered that both applications to be heard together, in that the decision is the originating summons would apply to the summons in chambers.

[4] The facts that give rise to the plaintiff's action herein and the chronology of events may be summarised as follows.

[5] On 22 December 2004, a complaint was lodged against the plaintiff by one Wan Haslan bin Wan Hassan on behalf of TH-NSTC Sdn Bhd to the defendant. A

[6] On 8 February 2005, the defendant send a notice to the plaintiff, requesting the plaintiff's written explanation to the complaint within 14 days from the date of receipt of the said notice. B

[7] On 8 March 2005, the plaintiff wrote to the defendant requesting for an extension of thirty (30) days from the date of his letter to respond to the complaint. C

[8] On 25 March 2005, the defendant responded by way of a letter urging the plaintiff to forward his explanation as soon as possible, failing which, the complaint shall be considered by the defendant without the benefit of his explanation. D

[9] Since the defendant did not received any further letters whether by way of explanation or otherwise from the plaintiff, the defendant proceeded to consider the complaint at its meeting held on 16 April 2005, and decided to refer it to a Disciplinary Committee pursuant to s. 103A(a) of the Legal Professional Act 1976 (LPA). The plaintiff was informed of this by the defendant by way of a letter dated 28 April 2005. E

[10] By a letter dated 20 June 2005, the plaintiff was informed by the Disciplinary Committee that a hearing date had been fixed for 12 July 2005 to hear the complaint. F

[11] By a letter dated 6 July 2005, the plaintiff through his solicitors Messrs De Silva, wrote to Chairman of the Disciplinary Committee seeking clarifications as to why a Disciplinary Committee had been constituted to hear the complaint when no prior investigation had been conducted by any Investigating Tribunal pursuant to LPA. In the same letter, the plaintiff's solicitor also sought for an adjournment of the hearing scheduled on 12 July 2005, giving the reason that the plaintiff would be overseas at that time. G H

[12] The Chairman of the Disciplinary Committee responded to the plaintiff's solicitors in a letter dated 6 July 2005, informing that the preliminary objection can only be heard at the hearing presided by the Disciplinary Committee itself. The plaintiff was further informed that a decision to adjourn the hearing could only be made collectively by the Disciplinary Committee itself. I

[13] Nevertheless, the hearing before the Disciplinary Committee on 12 July 2005 was adjourned to 27 July 2005. When the Disciplinary Committee sat on 27 July 2005 the plaintiff was absent. The plaintiff was not well and had seen a doctor who certified that he was unwell. Plaintiff's counsel then requested for an adjournment and tendered the medical certificate in support of the request at the hearing on 27 July 2005.

[14] The Disciplinary Committee rejected the plaintiff's request for an adjournment and proceeded with hearing the complaint. Evidence was recorded from one YM Raja Azahatuluyun binti Raja Jaafar on behalf of the complainant. Thereafter the Disciplinary Committee fixed 16 September 2005 to continue the hearing of the complaint. The hearing before the Disciplinary Committee was further adjourn in view of these proceedings.

[15] Before me, learned counsel for the plaintiff submitted that there is only one issue to be tried in this matter namely:

> Whether the defendant can proceed with a complaint made against the plaintiff, by appointing a Disciplinary Committee without first appointing an Investigating Tribunal to inquire into the complaint and submit a report, pursuant to the provisions of the LPA.

[16] It is not disputed that the defendant had not at any time constituted an Investigating Tribunal to inquire into the complaint and submit a report to the defendant for its consideration. Thus it is the contention of the plaintiff that the defendant in by-passing the Investigating Tribunal and appointing a Disciplinary Committee, has resulted in the defendant breaching the LPA and consequently rendered the proceedings commenced against the plaintiff to be void for procedural unfairness.

[17] Learned counsel for the defendant submitted that the Disciplinary Board has the power to constitute a Disciplinary Committee without first constituting an Investigating Tribunal. The defendant relies on ss. 103A(a) read together with 103B of the LPA.

[18] With respect I am unable to agree with the contention of the learned counsel for the defendant. Looking at scheme of the Act, disciplinary proceedings against an advocate and solicitor is governed by Part VII under the heading 'Disciplinary Proceedings'. Section 93 provides for the establishment of the Disciplinary Board and its corporation. Sections 95, 96 and 97 provides procedure

for the appointment of a Disciplinary Committee and an Investigating Tribunal. Section 99 provides how a complaint is to be made to the Disciplinary Board. Section 100 provides the mechanism for investigating a complaint which expressly provides as follows:

> (1) Where a written application or complaint is referred to the Disciplinary Board, the Disciplinary Board shall, (if it considers that there is merit in the application or complaint), forthwith constitute an Investigating Tribunal.

[19] Clearly from the above, the only discretion vested with the Disciplinary Board at this stage is to decide whether there is merit or not in the complaint. If it considers that there is merit in the complaint, then it shall forthwith constitute an Investigating Tribunal.

[20] Section 101 of the LPA provide the manner in which an Investigating Tribunal may investigate the complaint. Section 102 then contain provisions relating to the finding of the Investigating Tribunal and of the recommendations that the Investigating Tribunal may make in its report to the Disciplinary Board. The section provides that an Investigating Tribunal may recommend that a formal investigation is required or that it is not required. In the event the Investigating Tribunal recommends a formal investigation, then the Disciplinary Board shall constitute a Disciplinary Committee. Even where the Investigating Tribunal recommends that a formal investigation is not necessary, the Disciplinary Board may disagree and still appoint a Disciplinary Committee.

[21] It can be seen that, only when the Disciplinary Board has received a report from an Investigating Tribunal and the Disciplinary Board determine that ought to be a formal investigation that a Disciplinary Committee is appointed to investigate the complaint. The prerequisite is that there must be a report from the Investigating Tribunal first and a decision by the Disciplinary Board that a formal investigation is required.

[22] Thus, by the defendant herein by-passing the Investigating Tribunal and appointing a Disciplinary Committee, the defendant has unilaterally removed one of the tiers provided for by Parliament in the LPA for investigating a complaint. To me, the defendant cannot unilaterally do this and ignore the clear and express provisions of the LPA.

[23] Learned counsel for the defendant submitted that in certain circumstances, the defendant may appoint a Disciplinary Committee without the need of going through the mechanism of appointing an Investigating Tribunal. She referred to s. 103A(a) read together with 103B. The sections reads as follows:

> 103A. Where:
>
> (a) the Disciplinary Board determines that there should be a formal investigation; or
>
> (b) an advocate and solicitor has been convicted of an offence of criminal breach of trust under section 409 of the penal Code or any other offence involving fraud or dishonesty; or
>
> (c) the advocate and solicitor has been suspended under section 94 (4) of this part;
>
> the Disciplinary Board shall forthwith appoint a Disciplinary Committee which shall hear and investigate the matter.
>
> 103B. (1) The Disciplinary Board shall appoint a Disciplinary Committee to consider, in cases where an Investigating Tribunal has been appointed, the report of the Investigating Tribunal, or to investigate and make recommendations to the Disciplinary Board in respect of cases under section 103 A.
>
> (2) A Disciplinary Committee shall consist of (three) members of whom shall be:
>
> (a) (two) advocates and solicitors; and
>
> (b) (one) lay person,
>
> appointed from the Disciplinary Committee Panel.
>
> (3) The Disciplinary Board shall appoint a member from paragraph (a) of subsection (2) to be the chairman of the Disciplinary Committee.

[24] With respect, I am of the view ss. 103A and 103B must be considered in light of the preceding sections under Part VII of the LPA relating to 'Disciplinary Proceedings'. It cannot be considered in isolation to circumvent the procedure and mechanism provided by the LPA in dealing with complaints against advocates and solicitors. To do so will lead to arbitrariness which will be contrary to the spirit of the LPA.

[25] To me, looking at the scheme of the Act, it is my view that the only time when the Disciplinary Board may constitute a Disciplinary Committee without constituting an Investigating Tribunal is when an advocate and solicitor has been convicted of an offence of criminal breach of trust or any other offence involving fraud or dishonesty or the advocate and solicitor has been suspended under s. 94(4) of the LPA. In the presence case, the plaintiff has not been convicted of any criminal case nor has be been suspended. Hence, it is incumbent upon the defendant to follow the procedures as laid down by the LPA and not to unilaterally circumvent the statutory procedure provided for in the LPA.

[26] It is also contended by the defendant that the plaintiff has not exhausted the domestic remedy open to him. According to the plaintiff, there is still a forum available to the plaintiff to air his grievances or put forth his objection before the Disciplinary Committee. It may true in some cases, but in this case the question of exhausting the domestic remedy provided under the LPA does not arise because the very domestic remedy and procedure provided for under the LPA has been clearly ignored and breached by the defendant. Surely, the defendant cannot shield its unlawful conduct in by-passing and breaching the LPA and then claim that the plaintiff has not exhausted the domestic remedy for under the LPA. Simply put, one cannot exhaust a remedy when one part of that very remedy has been unilaterally removed by the defendant.

[27] In conclusion I am of the view that the very root of the provisions of LPA relating to the scheme of disciplinary proceedings as provided under the LPA has been breach. It is for the these reasons that I allow the plaintiff's application in terms of the originating summons filed herein.